

LUTZKER & LUTZKER — LLP —

Lutzker & Lutzker Newsletter May 2022

To our clients, colleagues and friends:

Thankfully, spring is here, and every day seems to bring an explosion of color! Likewise, hardly a day goes by without dizzying new developments in the realms of IP, privacy law, cybersecurity and artificial intelligence. We are trying mightily to keep our clients informed of the most relevant and exciting updates.

First, we would like to call your attention to *Imagining the Indian: The Fight Against Native American Mascoting*, a documentary that examines the movement to end the use of Native American names, logos and mascots in the world of sports and beyond. The documentary's film festival tour began at California's American Indian & Indigenous Film Festival on April 3rd, followed by screenings in Boston and at [FilmFestDC](#). Our congratulations to the team at *The Ciesla Foundation* for winning the award for Best Documentary Film at the Boston International Film Festival. Lutzker & Lutzker was delighted to provide legal counsel during the making of the film. We encourage you to see this extraordinary and thought-provoking documentary. For more information and updates on future viewing opportunities [click here](#).

Arnie Lutzker has served on the Board of Directors of FilmFest DC for nearly two decades. Its annual DC International Film Festival showcases the best in new world cinema including premieres, comedies, thrillers, dramas, social justice documentaries and new films by Washington filmmakers.

And now some updates to topics we have previously reported on:

- On January 20, 2022, [the National Collegiate Athletic Association \(NCAA\)](#) ratified a new version of its constitution, which notably includes guidance on its June 2021 decision to permit student athletes to profit from their name, image and likeness. We will continue to follow the IP and contractual complexities that result from this change, as well as the impact on player recruitment.
- In the case of *Unicolors, Inc. v. H&M Hennes & Mauritz, LP*, on February 24, 2022, [the Supreme Court reversed](#) the Ninth Circuit's ruling and found for *Unicolors*, holding that an applicant's inadvertent legal mistake should not invalidate a copyright registration.
- [The Supreme Court agreed to hear an important fair use case](#), granting a petition for certiorari by The Andy Warhol Foundation. The U.S. Court of Appeals for the Second Circuit had held that the Foundation was not entitled to the defense of fair use because Andy Warhol's prints did not "transform" an image by photographer Lynn Goldsmith. This case has far-reaching implications for the fair use defense.
- [The United States Patent and Trademark Office \("USPTO"\)](#) announced that it would *not* adhere to its initial deadline of April 9, 2022 for requiring private parties to provide biometric data to ID.me when filing for a trademark registration. This decision followed significant backlash to similar requirements by the IRS that were later abandoned and a USPTO promise to reevaluate its own proposal.
- In March 2022, the U.S. and EU announced an agreement in principle on a [new Privacy Shield](#). This has raised hopes that a new safe harbor mechanism for GDPR-compliant data

transfer to the U.S. will eliminate the ongoing chaos since the Court of Justice of the European Union invalidated the prior Privacy Shield in 2020. But few details are available, and some are skeptical that Privacy Shield 2.0 will stand up to scrutiny and new court challenges.

Every year the number of individuals who derive at least part of their income from posting on social media increases. From YouTubers to TikTokers to Twitch streamers, “content creation” is now a part-time passion project for many and a full-time job for a few. [Our insight provides guidance](#) for posters on steering clear of copyright infringement and unfair trade practices, keeping privacy concerns in mind and understanding the compensation scheme for each platform to make informed choices to maximize their revenue stream.

[A lawsuit brought by parents against Google under the Illinois Biometric Information Privacy Act](#) has survived a motion to dismiss and will proceed. The parents allege that Google violated the law when it collected data on students’ faces and voices through school-issued Chromebook laptops. The parents have standing to sue because the Illinois statute provides for a private right of action, allowing consumers to bring lawsuits for improper collection of their biometric data.

As remote work and education continue to be a part of American life, the demand for libraries to provide access to electronic books and other digital media has seen a sharp increase. [Our insight discusses legislation passed by Maryland and other state legislatures](#) with the goal of incentivizing publishers to negotiate with libraries under more reasonable terms, a measure supported by the American Library Association. The American Publishers Association filed a lawsuit in response against the state of Maryland, alleging among other things that the legislation was unconstitutional and preempted by federal copyright law. We will monitor this case to analyze potential consequences for both copyright owners and librarians.

In our continuing concern for safeguarding the vulnerable intangible cultural assets of indigenous populations, [we report on some promising developments](#) in both the public and private sectors:

- Special Traditional Knowledge (TK) licensing systems, akin to trademark law, are attempting to “repatriate” tribal digital heritage “taken” by ethnology museums and others in the name of educating the public. This movement, which parallels the repatriation of tangible property by museums, relies on context-specific licenses tailored to the specific cultural property.
- There is a movement to expand the concept of juridical personhood, for purposes of standing to sue, to natural elements, such as rivers and lakes, potentially providing an alternative way to protect these resources from exploitation.
- The amazing technology of 3-D scanning can be used to document cultural sites that are often inaccessible. Safeguards are needed to be sure that the indigenous guardians of some of these sites are engaged in the process and control the dissemination of what they consider secret or sacred.

- The U.S. Department of the Interior, under the leadership of Secretary Deb Haaland, working in coordination with Native American tribes, is taking steps to strengthen the Native American Graves Protection and Repatriation Act and pave the way for more vigorous enforcement of the law. Also, in consultation with Native American tribes, new names have been proposed for more than 600 U.S. geographic sites that include the derogatory term “squaw.”

Please don't hesitate to reach out to us at info@lutzker.com for more information on these developments or advice on your IP questions.

Enjoy the spring!

Insights from the Firm



NCAA Rule Change Paves the Way for Student Athlete Endorsement Deals: Addendum

On January 20, 2022, the National Collegiate Athletic Association ratified a new version of its constitution, which includes guidance on its recent rule that permits student athletes to profit from their name, image and likeness. A patchwork of state laws and rules from individual institutions creates legal complexities going forward. Our insights explore the impact on college athletes and the future of the NCAA.

[Read Here >>](#)

Supreme Court to Clarify Copyright Act Knowledge and Publication Standards: Unicolors, Inc. v. H&M Hennes & Mauritz LP: Addendum

On February 24, 2022, the Supreme Court reversed the Ninth Circuit’s ruling and found for Unicolors, holding that an applicant’s inadvertent legal mistake should not invalidate a copyright registration.



[Read Here >>](#)



Andy Warhol Decision Spells Stronger Rights for Photographers Fighting Infringers: Second Addendum

The Supreme Court has agreed to hear an important fair use case, granting a petition for certiorari by The Andy Warhol Foundation. The U.S. Court of Appeals for the Second Circuit had held that the Foundation was not entitled to the defense of fair use because Andy Warhol’s prints did not “transform” an image by photographer Lynn Goldsmith.

[Read Here >>](#)

2022 Brings New Requirements Via ID.me for Filing Trademark Applications with the United States Patent & Trademark Office: Third Addendum

Following increased backlash concerning the proposed and ongoing use of facial recognition technology by government agencies, lawmakers have launched an investigation into ID.me, requesting information from the company about its technology, business practices and existing contracts. This follows the USPTO's announcement that it would not be requiring biometric identification verification beginning in April 2022 as planned.

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EU Court Decision Invalidating Privacy Shield Results in Massive Confusion for U.S. Businesses: Addendum

In March 2022 President Biden and European Commission President Ursula von der Leyen announced that an agreement in principle has



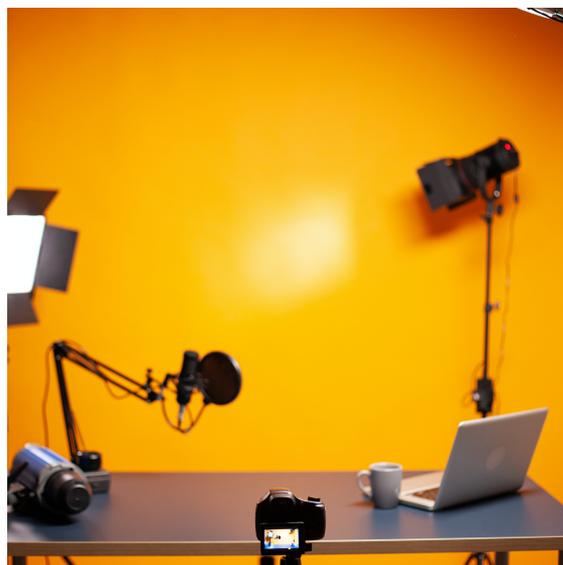
been reached on Privacy Shield 2.0, to be called the Trans-Atlantic Data Privacy Framework. This would replace the Privacy Shield invalidated by the Court of Justice of the European Union in 2020 and put in place a new safe harbor for GDPR-compliant data transfer to the U.S.

[Read Here >>](#)

Copyright & Privacy for Content Creators

Content creation on social media like YouTube and TikTok has exploded, and posters need to be aware of the copyright, privacy and other legal issues to be addressed. Our insight provides guidance as to some of the most common concerns.

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Are School-Issued Chromebooks Violating the Illinois Biometric Information Act?

Parents have brought a suit under the Illinois Biometric Information Act against Google on behalf of their children, claiming that the company violated the law when it collected data



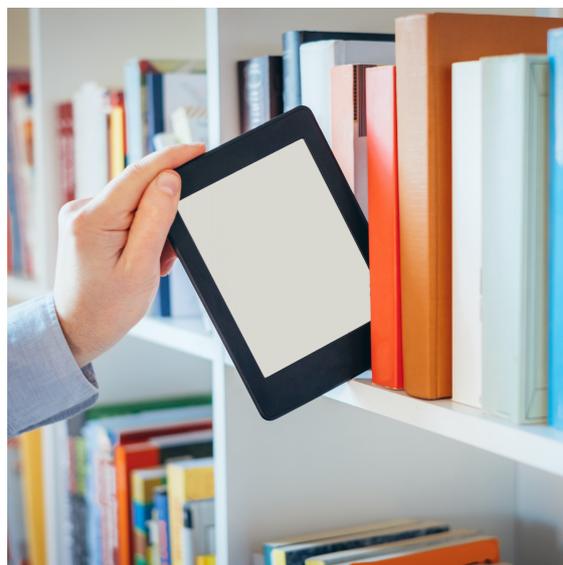
on students' faces and voices through school-issued Chromebook laptops. Denying a motion to dismiss, the judge has allowed the suit to proceed.

[Read Here >>](#)

E-Books & Libraries: State Legislation and Ongoing Lawsuits

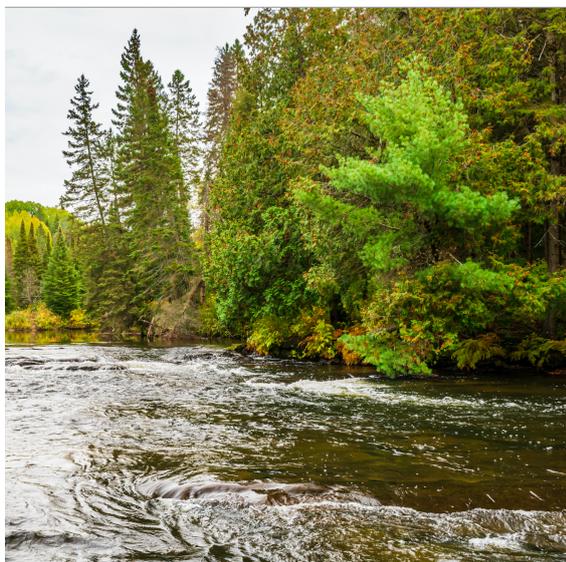
Remote work and education spell increased demand for digital access to information, including digital libraries and electronic books. Some state legislatures, recognizing the interest in expanded digital access, have proposed legislation to address this demand, once again pitting authors and publishers against libraries and digital platforms.

[Read Here >>](#)



Promising Developments in Protecting Intangible Cultural Property

The intangible cultural assets of indigenous



populations, such as traditional knowledge, legends and storytelling, are vulnerable to exploitation because most current intellectual property systems do not provide adequate protection. Nevertheless, there are promising developments in both the public and private sectors towards developing new ways to safeguard these priceless resources.

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Lutzker & Lutzker LLP: FAQs

Don't forget to check out the new FAQ feature on our website, focusing on [Privacy Law](#), [Technology and the K-12 Classroom](#), [Copyright Law](#), [Trademark Law](#), [NFTs](#) and [Patent FAQs](#).

Connect with us online



LUTZKER & LUTZKER — LLP —

Arnold Lutzker and Susan Lutzker founded Lutzker & Lutzker LLP in 1998 to provide high-quality, cost-effective legal services to businesses, creative professionals and their lawyers in the creation, strategic exploitation and defense of intellectual property assets.

Drawing on their experiences in law, business and the arts, our firm's lawyers have stayed on the leading edge of digital-era issues, including online content, social media, mobile applications, cybersecurity and data privacy requirements. We advise corporate counsel on challenging intellectual property matters and also help more than 300 clients protect and manage their traditional copyright and trademark portfolios.

Questions: please email us at info@lutzker.com



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